

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

<p>ANDREW GIBSON, on behalf of himself and all others similarly situated,</p> <p style="text-align: center;"><i>Plaintiff,</i></p> <p style="text-align: center;">v.</p> <p>BARTLETT DAIRY, INC. and FARMLAND FRESH DAIRIES, LLC,</p> <p style="text-align: center;"><i>Defendants.</i></p>	<p>Case No. 20-cv-2848 (NGG) (SJB)</p> <p><b>JOINT STATUS REPORT</b></p>
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------

**JOINT STATUS REPORT**

Plaintiff Andrew Gibson (“Plaintiff”) and Defendants Bartlett Dairy, Inc. and Farmland Fresh Dairies, LLC (collectively, “Defendants”) (collectively, the “Parties”) submit this Joint Status Report pursuant to this Court’s December 8, 2022 Order following the status conference held that same day. As set forth herein, the Parties are proceeding according to the Court’s May 17, 2022 Scheduling Order, are working cooperatively to resolve outstanding discovery disputes, and are exploring mediation as an option for resolution of this litigation prior to trial.

**I. PROCEDURAL HISTORY**

This is a putative class action alleging misrepresentation of dairy products. Plaintiff’s original complaint (the “Complaint”) was filed on June 26, 2020. (ECF No. 1.) The Parties served their initial disclosures on October 5, 2020. On October 19, 2020, the Court stayed discovery pending resolution of Defendants’ motion to dismiss. On October 22, 2020, the Court held a pre-motion conference. The initial scheduling conference was held on November 5, 2020, at which discovery was limited to jurisdictional issues or informal exchange of information to aid settlement discussions. On May 7, 2022, the Parties mediated the dispute before (Ret.) Judge Gregory M. Sleet of JAMS but were unable to reach resolution. On June 1, 2021, Defendants moved to dismiss

the action for (1) lack of jurisdiction under CAFA's "home state" exception; and (2) failure to state a cause of action as to Defendant Bartlett Dairy, Inc. (ECF No. 34.) On March 15, 2022, the Court granted in part and denied in part the motion to dismiss. (ECF. No. 36.) Defendants answered the Complaint on April 15, 2022 (ECF No. 40.), and a status conference was held on April 27, 2022. On May 17, 2022, the Court adopted the Parties' proposed discovery schedule, setting February 24, 2023 as the deadline to complete fact discovery and May 26, 2023 as the deadline to complete expert discovery. A status conference was held on December 8, 2022. The Parties filed a proposed class certification schedule on January 30, 2023. The parties are scheduled to conduct another mediation on Friday, February 3, 2023.

## **II. DISCOVERY STATUS**

The Parties have engaged in discovery since the Court's May 17, 2022 scheduling order, as follows:

- On April 24, 2022, Plaintiff issued requests for the production of documents and interrogatories on both Defendants. Defendants responded to the interrogatories and served objections to the document requests on August 15, 2022 and have finished responding to these requests.
- On June 7, 2022, Defendants issued requests for the production of documents and interrogatories on Plaintiff. Plaintiff responded to the interrogatories and served objections to the document requests on August 28, 2022 and have now finished responding to these requests.
- On November 1, 2022, the parties met and conferred on issues relating to Plaintiffs' discovery responses.
- On November 9, 2022, Defendants served a second demand for the production of documents upon Plaintiff, which Plaintiff has responded to.
- Also on November 9, Defendants served third-party subpoenas on Plaintiffs' counsel, Kim E. Richman, for the production of documents and deposition testimony. Mr. Richman objected to the subpoenas on November 23, 2022, and the Court held the subpoena in abeyance at the December 8, 2022 status conference, pending further third-party discovery by Defendants.

- Defendants' Position: Based upon the testimony by Trilogy labs on January 25, 2023, the defendants have determined that they will need to enforce the subpoena to Mr. Richman. Defendants intend to bring this matter to the attention of the Court after the deposition is completed of the second Laboratory which is scheduled to take place on February 6, 2023.
- Plaintiff has served subpoenas requesting production of documents on the following third parties involved in Defendants' supply chains:
  - On November 14, 2022, subpoenas to HP Hood, LLC; Cumberland Dairy, Inc.; Dairy Farmers of America; and Lucerne Foods, Inc. HP Hood served objections on December 7, 2022, and produced documents on January 3, 2023. Dairy Farmers of America began to produce documents on behalf of itself and Cumberland Dairy on January 11, 2023. Lucerne served objections and began producing documents on January 3, 2023, and has completed its production.
  - On November 15, 2022, a subpoena to Clover Farms Dairy Co. Clover Farms Dairy Co. served objections on November 28, 2022 and produced documents on December 23, 2022.
  - On November 29, 2022, a subpoena to Byrne Dairy, Inc. Byrne Dairy, Inc. produced documents on January 25, 2023.
- On November 29, 2022, Plaintiff served a subpoena requesting documents on Information Resources, Inc., which served objections on December 14, 2022, and has not yet produced documents.
- On December 2, 2022, the parties met and conferred on issues relating to the subpoena of Mr. Richman, which the parties were unable to resolve. The parties also discussed, and were able to resolve, discovery matters relating to privilege logs and deposition scheduling.
- Defendants served additional subpoenas for deposition testimony and the production of documents on the testing laboratories Plaintiff's counsel hired to test Farmland Fresh Dairies products, Health Research Institute ("HRI Labs") and its CEO, Dr. John Fagan; and Trilogy Analytical Laboratory, Inc. ("Trilogy"). Plaintiff served objections to both subpoenas on December 20, 2022. Counsel met and conferred about these objections on January 5, 2023 and reached an agreement. Trilogy has produced documents in response to its subpoena. HRI Labs produced documents on January 30, 2023, and Dr. Fagan's deposition is scheduled for February 6.
  - Defendants' Position: HRI Labs' document production received is inadequate and does not have the entirety of the documents requested in the subpoena. Emails have been sent to HRI requesting additional documents but no additional production has been made. The missing materials include, among other things, the raw testing data

and the complete chain of custody materials for the samples tested. If these materials are not produced, the deposition will be adjourned. We also have a good faith belief that there are additional materials missing because plaintiff's counsel has produced to us HRI materials that are not in documents produced to us from HRI – leading us to conclude that the entire file was not produced to us by HRI.

- There is also a dispute regarding certain materials which are in the possession of Trilogy Labs and HRI Lab for which plaintiff has asserted a claim of work product doctrine. Defendants do not believe that such materials are privileged and will bring a motion to compel the production of these materials after the conclusion of the deposition of HRI Labs scheduled for February 6<sup>th</sup>. As part of its application, defendants will request that the cost of any additional deposition of these deponents be paid for by plaintiff. The dispute was unable to be resolved on meet and confers between the parties.
- Plaintiff's Position: Plaintiff has claimed that two documents produced by Trilogy, and portions of three documents produced by HRI Labs, are protected by the work product doctrine. Defendants' counsel agreed to delete one of these documents at a January 5, 2023 meet and confer, as the protected information relates to products not at issue in this case. The other documents were produced after that meet and confer but similarly pertain to non-Farmland products. Plaintiff has not objected to the production of testing data or chain of custody materials for Farmland Fresh Dairies products, has produced any documents in his or his counsel's possession on the matter, and notes that HRI's production included sample submission information and test results. Plaintiff does not believe additional depositions of the labs would be necessary.
- On December 13, 2022, Defendants sent Plaintiff an updated privilege log.
- On December 15, 2022, Plaintiff sent Defendants an updated privilege log.
- On December 16, 2022, Plaintiff took the 30(b)(6) deposition of Bartlett Dairy, Inc. via Zoom.
- On December 20, 2022, Plaintiff took the 30(b)(6) deposition of Farmland Fresh Dairies, LLC via Zoom.
- On January 14, 2023, Defendants took the deposition of Plaintiff Andrew Gibson live at the offices of Defendants' counsel in Purchase, New York.
- On January 18, 2023, Plaintiff sent subpoenas for service to the following third parties involved in Defendants' supply chain. These subpoenas have been sent to a process server and are still being served:
  - A deposition subpoena on Dairy Farmers of America. This deposition will be scheduled for a date in mid-February.

Subpoenas for the production of documents on NOGA Dairies, Inc.; Nelson N. Burkholder; Luke Brubaker; Bru-Crest Farms; Lime Mist Holsteins; Donald Duncan Farm; Meadow Spring Farm; Alamance Foods, Inc.; and Earl Hafer & Sons.

- Defendants' Position: Defendants intend to file a motion to quash these subpoenas and believes that the service of these subpoenas is excessive, duplicate and violates the proportionality standard implicit in discovery. The defendants will conduct a meet and confer with plaintiff's counsel during the week of January 30, 2023.
- Plaintiff's Position: Plaintiff maintains that the subpoenas are not excessive, duplicative, or disproportional to the needs of the case, and that Defendants lack standing to challenge third party subpoenas on these grounds. Plaintiff's counsel met and conferred with Defendants' counsel on January 30, 2023 and plan to further meet and confer on February 2, 2023 at Defendants' counsel's request.
- On January 20, 2023, Plaintiff sent a subpoena out for service on Alamance Foods, a third Party involved in Defendants' supply chain.
  - Defendants' Position: Defendants intend to file a motion to quash this subpoena and believes it is also duplicate and violates the proportionality standard implicit in discovery. The defendants will conduct a meet and confer with plaintiff's counsel during the week of January 30, 2023.
  - Plaintiff's Position: Plaintiff maintains that the subpoenas are not excessive, duplicative, or disproportional to the needs of the case, and that Defendants lack standing to challenge third party subpoenas on these grounds, and will meet and confer with Defendants' counsel.
- On January 25, 2023, Defendants took the deposition of Trilogy Analytical Laboratory, Inc. via Zoom.
- On January 25, 2023, Plaintiff served a second set of interrogatories on Defendant Farmland Fresh Dairies, LLC, and second sets of requests for the production of documents on both Defendants.
- On January 26, 2023, Defendant sent a subpoena for documents out for service on Rite Aid Corporation, a third party from which Plaintiff recalls purchasing Products at issue.
- On January 27, 2023, Defendant served a second set of interrogatories and third set of document requests on Plaintiff.
- On January 30, 2023, Plaintiff sent out for service subpoenas for documents to Land O' Lakes, Inc. and Volles Dairy, LLC, both third parties involved in Defendants' supply chain.

### **III. SETTLEMENT NEGOTIATIONS**

As discovery continues, the Parties are engaged in substantive discussions concerning potential resolution of the litigation prior to trial. The Parties will attend a private mediation session before Judge Frank Maas of JAMS on February 3, 2023.

Dated: January 31, 2023

Respectfully submitted,

#### **RICHMAN LAW & POLICY**

/s/ Kim E. Richman

Kim E. Richman  
1 Bridge Street, Suite 83  
Irvington, NY 10533  
(718) 705-4579  
krichman@richmanlawpolicy.com

*Attorneys for Plaintiff*

#### **PAYKIN KRIEG & ADAMS, LLP**

/s/ David A. Schrader

David A. Schrader  
Joseph N. Paykin  
2500 Westchester Avenue,  
Suite 107 Purchase, NY 10577  
212-725-4423  
jpaykin@pka-law.com

*Attorneys for Defendants*